(2) (3)

Nos. 96-552 and 96-553

In the Supreme Court of the United States

OCTOBER TERM, 1996

RACHEL AGOSTINI, ET AL., PETITIONERS

v.

BETTY-LOUISE FELTON, ET AL.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL., PETITIONERS

v.

BETTY-LOUISE FELTON, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECRETARY OF EDUCATION

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22 pp

QUESTIONS PRESENTED

Whether the Court should reconsider its decision in *Aguilar* v. *Felton*, 473 U.S. 402 (1985), and whether this case presents an appropriate occasion for doing so.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 11a-13a)[1] and the district court (*id.* at 1a-10a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1996. The petitions for a writ of certiorari

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[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 96-552.

were filed on October 7, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a federal program to provide remedial instruction and support services to needy elementary and secondary school students. See 20 U.S.C. 6301 *et seq.* To qualify for assistance under the "Title I" program,[2] a student must be failing, or at risk of failing, the State's student performance standards. The student must also reside within the attendance boundaries of a public school located in a low-income area. 20 U.S.C. 6313, 6315(b). Title I services must be provided "equitabl[y]" to all participating students, whether in public, religious, or secular private schools. See 20 U.S.C. 6321(a) and (d); 60 Fed. Reg. 34,800, 34,807-34,808 (July 3, 1995) (to be codified at 34 C.F.R. 200.10-200.11).[3]

[2] The program at issue was originally known as "Title I," because it was first enacted as Title I of the Elementary and Secondary Education Act of 1965. In 1981, Congress enacted Chapter 1 of the Education Consolidation and Improvement Act, Pub. L. No. 97-35, Tit. V, Subtit. D, 95 Stat. 464, as a continuation of Title I, and the program became known as "Chapter 1." See *Aguilar* v. *Felton*, 473 U.S. 402, 404 n.1 (1985) (discussing the program's earlier history). In 1988, Congress enacted a new version of the program in the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, §§ 1003(a), 6303(a), 102 Stat. 293, 431. Effective July 1, 1995, the Chapter 1 program again became known as "Title I," pursuant to the Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 101, 108 Stat. 3519. The most recent legislation made substantive changes in the program, but none of those changes substantially affects the issues in this case.

[3] See *Aguilar*, 473 U.S. at 404-405; *Pulido* v. *Cavazos*, 934 F.2d 912, 915 (8th Cir. 1991); *Barnes* v. *Cavazos*, 966 F.2d 1056, 1059 (6th Cir. 1992); *Board of Educ. of Chicago* v. *Alexander*, 983 F.2d 745, 747-748 (7th Cir. 1992); *Walker* v. *San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1453 (9th Cir. 1995).

Title I funds may be used only to supplement, and not to supplant, the students' regular classroom instruction. See 20 U.S.C. 6322(b). All Title I services provided to children in private schools must be "secular, neutral, and nonideological." 20 U.S.C. 6321(a)(2). When used for students in private schools, the funds may not be used to meet the "needs of the private school" itself, but only the needs of the students. 60 Fed. Reg. 34,808 (1995) (to be codified at 34 C.F.R. 200.12).

2. In 1978, six plaintiffs brought this action to challenge, as violative of the Establishment Clause of the First Amendment, the use of Title I funds to pay the salaries of public school teachers providing remedial instruction to students inside parochial schools. This Court held that such use of Title I funds did violate the Establishment Clause. *Aguilar* v. *Felton*, 473 U.S. 402 (1985).

The Court noted that "[t]he professionals involved in the program are directed to avoid involvement with religious activities * * * and to bar religious materials in their classrooms," and that "the administrators of the parochial schools are required to clear the classrooms used by the public school personnel of all religious symbols." 473 U.S. at 407. The Court concluded, nonetheless, that the public school system's supervisory efforts to ensure that the instruction retained a purely secular content "inevitably results in the excessive entanglement of church and state," *id.* at 409, because "[a]gents of the city must visit and inspect the religious school

regularly, alert for the subtle or overt presence of religious matter in Title I classes," and "the religious school must obey these same agents when they make determinations as to what is and what is not a 'religious symbol' and thus off limits in a Title I classroom," *id.* at 413. The Court relied on previous "entanglement" decisions such as *Meek* v. *Pittenger*, 421 U.S. 349 (1975), and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

On remand from this Court, the district court entered an injunction prohibiting the Secretary of Education and the Chancellor of the Board of Education of the City of New York from using public funds for any Title I program, to the extent that such use authorizes instructional and counseling services inside religious schools. Pet. App. 14a-16a. It is that injunction from which petitioners have sought relief under Rule 60(b) of the Federal Rules of Civil Procedure. See *id.* at A11-A12.

3. After this Court's decision in *Aguilar*, local school districts adjusted their practices in order to continue to provide Title I services to private school students, albeit in settings other than inside religious schools. School districts have provided Title I services in public school classrooms, in mobile units, at leased sites, and through computer-assisted instruction. The Secretary of Education has required that school districts pay for the administrative costs of such alternative delivery systems from their Title I funds before using any such funds for core instructional and counseling services.[4] See 60 Fed. Reg. 34,810 (1995) (to be codified at 34 C.F.R. 200.27(c)).

[4] Both the alternative delivery methods and the Secretary's requirement that costs for compliance with the Court's decision in *Aguilar* be paid for "off the top" of Title I funds have been upheld against several statutory and constitutional challenges. See *Pulido* v. *Cavazos*, 934 F.2d 912 (8th Cir. 1991); *Barnes* v. *Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Board of Educ. of Chicago* v. *Alexander*, 983 F.2d 745 (7th Cir. 1992); *Walker* v. *San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995). Many of the same practices upheld in the foregoing cases now exist in New York City, see 96-553 Pet. App. A43-A70, ¶¶ 24-77, and are currently under challenge in *Committee for Public Education and Religious Liberty (PEARL)* v. *Secretary, United States Department of Education*, No. 88-CV-0096 (JG) (E.D.N.Y.). On October 17, 1996, the district court in *PEARL* rejected the constitutional challenge to the Title I practices, but other issues are still pending.

The economic costs of delivering Title I services to students enrolled in religious schools at sites other than the religious schools themselves are considerable. The Secretary of Education has expressed concern that school districts "have expended hundreds of millions of dollars on non-instructional costs in order to comply with [the Court's decision in *Aguilar*]," Pet. App. 18a, and that New York City was required in one fiscal year alone to spend $6 million on compliance that could otherwise have been used for the core instructional and counseling purposes of Title I, *ibid.* The Secretary has also noted that, although Title I services have been provided, since *Aguilar*, through "computer-assisted instruction in private schools and, in appropriate circumstances, parking mobile vans on or near private school property," *id.* at 18a-19a, there has been criticism that "even the alternative arrangements that have developed as a result of [*Aguilar*] are not the most educationally effective methods for providing Title I services," *id.* at 19a. The Secretary of Education has therefore stated that

he supports efforts to have the *Aguilar* decision reconsidered "in an appropriate case." *Ibid.*

4. In October and December 1995, petitioners filed motions pursuant to Federal Rule of Civil Procedure 60(b) for relief from the injunction entered by the district court on remand from this Court. The district court denied the motions. Pet. App. 1a-10a.

The district court first ruled that a Rule 60(b) motion was a proper mechanism for petitioners to present their request for relief from the September 1985 injunction. Pet. App. 7a-10a. The court acknowledged that "Rule 60(b) may not be used as a substitute for appeal," but it found it "plain" that, in this case, a Rule 60(b) motion "does not offend that rule." *Id.* at 7a. Then, after quoting the separate views of several Justices in *Board of Education of Kiryas Joel Village School District* v. *Grumet*, 114 S. Ct. 2481 (1994), regarding this Court's decision in *Aguilar* (discussed at page 10, *infra*), the court observed that "it is at least unusual, if not extraordinary, that the losing parties to a Supreme Court case can point to such promising indicia that they would win the case now." Pet. App. 7a-8a. In such extraordinary circumstances, the district court concluded, allowing petitioners "to resuscitate pursuant to Rule 60(b) the issue they lost in 1985 strikes the proper balance between the conflicting principles that litigation should have finality and that justice should be done." *Id.* at 8a.

Addressing the "law of the case" doctrine, the district court noted that courts may depart from that rule for a "compelling reason" such as an "intervening change of law." Pet. App. 8a. The court thus accepted that, if petitioners were able to show "a sea change in the law" since this Court's decision in

Aguilar, the law-of-the-case doctrine would not preclude relief under Rule 60(b). *Ibid.* The court found further that the motion was not untimely, and that the plaintiffs who brought the original action would not suffer any cognizable prejudice as a result of any delay in bringing the Rule 60(b) motion. *Id.* at 8a-9a. And the court expressly found that a motion for relief from the injunction was "far preferable" to requiring the school district to challenge the judgment by placing itself in contempt by disobeying the injunction. *Id.* at 9a.

Ultimately, however, the court declined to afford petitioners relief from the judgment. The court observed that "[t]here may be good reason to conclude that *Aguilar*'s demise is imminent, but it has not yet occurred." Pet. App. 10a. The court also found it doubtful that it could properly anticipate any such decision by this Court to reverse its own decision in this case. *Ibid.* The district court suggested, however, that "there could scarcely be a more appropriate vehicle for that review than the same case, in which, eleven years later, the same school board is struggling with the consequences of the Supreme Court's decision." *Ibid.*

The court of appeals affirmed, in a summary order, "substantially for the reasons" stated in the district court's decision. Pet. App. 13a.

ARGUMENT

1. a. In their petitions for a writ of certiorari, petitioners ask this Court to reconsider its decision in *Aguilar* v. *Felton*, 473 U.S. 402 (1985), which held that public funds may not be used to pay for the salaries of teachers providing Title I services to students inside parochial schools, even when those services are

entirely secular in content and all religious symbols are removed from the classroom in which the services are provided. The Secretary of Education defended the constitutionality of such use of Title I funds in *Aguilar*, and he continues to believe that the decision in *Aguilar* was based on an incorrect interpretation of the Establishment Clause.

The Secretary also believes that the decision in *Aguilar* has had a significant, adverse impact on the provision of secular educational and counseling services to low-income students in need of remedial aid in both public and private schools. See Pet. App. 17a-19a. Hundreds of millions of dollars of Title I funds, which otherwise could have been used for instructional services, have been spent on administrative costs made necessary only because of the need to comply with *Aguilar*—by, for example, renting mobile instructional units and escorting students to and from instruction sites away from religious schools. There has also been substantial criticism of the efficacy of the alternative instructional mechanisms necessary for compliance with *Aguilar*, such as computer-assisted instruction and teaching in mobile units. *Id.* at 18a-19a.

b. Subsequent developments in the Court's Establishment Clause jurisprudence, particularly with respect to the "entanglement" prong of the Court's Establishment Clause test, create substantial doubt that the Court would decide *Aguilar* the same way if it were presented today with the question afresh. In *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), the Court rejected an "entanglement" challenge to the Adolescent Family Life Act (AFLA), 42 U.S.C. 300z *et seq.*, which provides for grants to public and nonprofit organizations, including organizations with religious affiliations, for services relating to adolescent sexuality and pregnancy. The Court noted that the legislative history of AFLA expressed the view that the use of AFLA funds to promote religion was contrary to the intent of the legislation, and that the Secretary of Health and Human Services "police[d] the grants * * * to ensure that federal funds are not used for impermissible [sectarian] purposes." 487 U.S. at 614-615. The plaintiffs challenged the constitutionality of AFLA on grounds similar to those raised in *Aguilar*, namely, that the supervision of use of the grants created excessive entanglement of church and state.

The Court responded to that contention in *Kendrick* by observing that "this litigation presents us with yet another 'Catch-22' argument: the very supervision of the aid to assure that it does not further religion renders the statute invalid. * * * For this and other reasons, the 'entanglement' prong * * * has been much criticized over the years." 487 U.S. at 615-616 (citing, *inter alia*, Justice O'Connor's dissenting opinion in *Aguilar*). But the Court found *Aguilar* distinguishable on the ground that AFLA required "less intrusive monitoring" of the day-to-day operations of the religious organization by the federal government. *Id.* at 616. At the same time the Court noted: "Unquestionably, the Secretary will review the programs set up and run by the AFLA grantees, and undoubtedly this will involve a review of, for example, the educational materials that a grantee proposes to use. The Secretary may also wish to have Government employees visit the clinics or offices where AFLA programs are being carried out to see whether they are in fact being administered in accordance with statutory and constitutional requirements." *Id.* at 616-617. Similarly, in *Zobrest* v.

Catalina Foothills School District, 509 U.S. 1 (1993), the Court rejected an Establishment Clause challenge to a school district's providing a sign language interpreter for a deaf student enrolled in a private religious school.

Since the Court's decisions in *Kendrick* and *Zobrest*, several Justices have expressed the view that *Aguilar* should be reconsidered. In his dissenting opinion in *Board of Education of Kiryas Joel Village School District* v. *Grumet*, 114 S. Ct. 2481 (1994), Justice Scalia, joined by the Chief Justice and Justice Thomas, stated that the Court's decision in *Aguilar* is "so hostile to our national tradition of accommodation [that it] should be overruled at the earliest opportunity." *Id.* at 2515. In her concurring opinion in *Kiryas Joel*, Justice O'Connor expressed the view that the provision of Title I instruction on the premises of private religious schools would be "entirely permissible" under the Constitution, and that the Court "should, in a proper case, be prepared to reconsider" *Aguilar*. *Id.* at 2498. Justice Kennedy stated, in his separate concurring opinion in *Kiryas Joel*, that the decision in *Aguilar* was "unfortunate" and "may have been erroneous," and that "it may be necessary for [the Court] to reconsider [it] at a later date." *Id.* at 2505.

2. As pointed out above, the Secretary of Education believes that *Aguilar* was incorrectly decided and should be reconsidered "in an appropriate case." Pet. App. 19a. That remains the position of the Secretary. The question then raised is whether this is an appropriate case for such reconsideration. Petitioners sought relief from the district court's judgment, entered pursuant to this Court's mandate, under Rule 60(b) of the Federal Rules of Civil Procedure, and

they now seek review of the court of appeals' affirmance of the district court's denial of that relief. Plainly, the district court was compelled to adhere to this Court's directly governing precedent in the same case. At least in the absence of an intervening decision of this Court specifically overruling *Aguilar*, the district court was bound both by *stare decisis* and by this Court's mandate to deny the requested relief. See *Vendo Co.* v. *Lektro-Vend Corp.*, 434 U.S. 425, 427-428 (1978) (per curiam) (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895)). It follows as well that the court of appeals was required to affirm the district court's order denying relief under Rule 60(b).

This Court, by contrast, does have the authority to overrule its own prior decision, even in the same case.[5] The Court has suggested, in referring to the law-of-the-case doctrine, that, with respect to its own decisions, prior rulings "should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 446 (1992) (citation omitted). But the Court has also observed that, although the law of the case "directs a court's discretion, it does not limit the tribunal's power." *Arizona* v. *California*, 460 U.S. 605, 618 (1983); see *Wyoming* v. *Oklahoma*, 502 U.S. at 446 ("Of course, we surely have the power to accede to Oklahoma's request at this late date * * * to depart from our prior rulings."). We are not aware,

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[5] The Court has, for example, granted petitions for rehearing and, on rehearing, reversed its prior decisions. See *Reid* v. *Covert*, 354 U.S. 1 (1957); *Jones* v. *Opelika*, 319 U.S. 103 (1943) (per curiam).

however, of any instance in which the Court has reconsidered the merits of a prior decision in the same case in a procedural posture similar to this one, in which the case returned to this Court from a lower court, after entry of a final judgment on remand and denial of a motion for relief from that judgment.[6]

We recognize that several factors may counsel against reconsideration of the *Aguilar* decision in the same case. In addition to general concerns about *stare decisis*, with regard to relitigation in the same case the judicial system has a particularly strong interest in finality of litigation. "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent actions." *Arizona* v. *California*, 460 U.S. at 619 (quoting *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979)). Thus, although an appellate court (including this Court) has the power to reconsider its prior decisions, there is a policy, embodied in the law-of-the-case doctrine, against readily permitting parties to reopen litigation for the purpose of seeking reexamination of a legal ruling issued by an appellate court in the same case.

Those particular jurisprudential concerns would be lessened if a person other than the petitioners in this case commenced litigation intended to seek reconsideration of *Aguilar* by this Court. To be sure, *Aguilar* is a precedent of nationwide application and therefore binding on all lower courts under the doctrine of *stare decisis*. But other persons, including school districts other than that of the City of New York, that are not bound by the injunction issued by the district court on remand from this Court would not face the same problem of the law of the case presented in this case.

[6] The *Arizona* v. *California* and *Wyoming* v. *Oklahoma* cases, discussed in the text, were original actions in this Court. In both cases, the Court adhered to its previous decision, but it also observed that "wholesale" extrapolation of the law-of-the-case doctrine into original actions was inappropriate. *Arizona*, 460 U.S. at 619; *Wyoming*, 502 U.S. at 446.

On the other hand, there are significant factors suggesting that the law-of-the-case doctrine should not prevent reconsideration of *Aguilar* in this case. That doctrine is not a rigid rule, and an appellate court may depart from its previous decision in light of changed circumstances, including intervening decisional law that would cause injustice by continued adherence to the prior ruling. Cf. *Arizona* v. *California*, 460 U.S. at 618 n.8. Thus, although the lower courts in this case were bound by this Court's mandate and its decision directly governing this case, this Court might well conclude that its subsequent decisions in *Kendrick* and *Zobrest*, followed by the separate opinions in *Kiryas Joel* regarding *Aguilar*, constitute sufficient intervening circumstances to warrant reconsideration of *Aguilar* here notwithstanding its status as the law of this case. Cf. *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 377 (1992) (district court denied Rule 60(b) motion because intervening decision "did not directly overrule any legal interpretation on which the [original order] was based"; court of appeals affirmed; this Court vacated and remanded); *System Federation No. 91* v. *Wright*, 364 U.S. 642, 650 n.6 (1961) ("There are many cases where a mere change in decisional law

has been held to justify modification of an outstanding injunction.").

In addition, there are no other cases available to present the issue of reconsideration of *Aguilar* in the foreseeable future.[7] Although other parties might be able to commence an action against the Secretary for the purpose of ultimately requesting this Court to reexamine *Aguilar*, that course would delay consideration of this significant issue and also would require considerable expenditure of judicial and other resources. And at least in the lower courts, that

[7] There are no other cases squarely presenting the question in *Aguilar* of delivery of Title I remedial services to students inside private religious schools. But cf. *Helms* v. *Cody*, 856 F. Supp. 1102 (E.D. La. 1994) (holding that state program under which public school teachers provide special education inside parochial schools violates Establishment Clause; motion to reconsider under Federal Rule of Civil Procedure 59 still pending). The Secretary therefore has not had an opportunity to request this Court to reconsider *Aguilar* in any case applying *Aguilar* in related contexts. As we have pointed out above, there have been several challenges to the use of mobile classrooms to deliver services to students in private religious schools, and to the "off-the-top" method of allocating a school district's Title I funds. But in each case, the challenge was rejected (see pp. 4-5 n.4, *supra*, and cases cited), and in none of those cases did the losing plaintiff seek review in this Court. Hence, the federal government, which was a defendant in all of those cases, was never presented with an opportunity to suggest that the Court grant a petition for a writ of certiorari and, at the same time, reconsider its underlying decision in *Aguilar*. Nor does it appear that the federal government will be presented with such an opportunity in the near future. Compare, *e.g.*, *Solorio* v. *United States*, 483 U.S. 435 (1987) (overruling *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), which imposed a "service connection" test for court-martial jurisdiction, in a subsequent case that initially involved only the application of the *O'Callahan* rule).

delay and expenditure necessarily would produce the same result that obtained below in this case, since even in the absence of any controlling law of the case, this Court's decision in *Aguilar* is controlling precedent that binds *all* lower courts. See *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").[8] The district court in this case compiled an extensive record when the case was previously litigated, and the City has updated the record with an extensive affidavit in support of its Rule 60(b) motion. See 96-553 Pet. App. A27-A101.[9]

Ultimately, the question of reconsidering the *Aguilar* decision in the same case is one of this Court's discretion and sound judicial administration, rather than its authority. We would not lightly suggest to the Court that it decline to follow its own law of the case. But in the unique circumstances of

[8] The Secretary of course will continue to comply with the requirements of *Aguilar* in his administration of the Title I program. But because the Secretary supports reexamination of *Aguilar*, there would be a problem in a future case of identifying a nongovernmental defendant to a declaratory judgment action ready, willing, and able to undertake the cost of presenting a full defense against reconsideration of *Aguilar*, and of preparing a record to that end.

[9] If the Court deemed it necessary, the record could be supplemented further on remand, were this Court first to conclude that its prior decision in this case should not stand as an absolute barrier to renewed adjudication of the propriety of furnishing Title I services inside religious schools.

this case, we believe, on balance, that this is an appropriate occasion for reconsideration of *Aguilar*.

If the Court agrees, but has doubts regarding the appropriateness of doing so on certiorari to review the court of appeals' affirmance of the district court's denial of relief under Rule 60(b), we suggest that the Court could, either now or at a later date, also consider whether to treat the petitions for a writ of certiorari as petitions for rehearing of the Court's prior ruling in this case (see, *e.g.*, *Gondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (per curiam) (granting successive petition for rehearing three years after prior denial of rehearing)) or as motions to recall and modify the Court's prior judgment (see, *e.g.*, *Cahill* v. *New York, N.H. & H.R.R.*, 351 U.S. 183 (1956) (per curiam) (granting motion to recall and amend the Court's judgment)). Compare *Citizens to Preserve Overton Park* v. *Volpe*, 400 U.S. 939 (1970) (treating application for a stay and opposition thereto as a petition for a writ of certiorari and opposition thereto, and granting certiorari).

In one way or another, we believe that this Court necessarily has the power to modify a prior judgment, such as *Aguilar*, that has continuing, prospective effect. Any questions that the Court may have concerning the appropriateness of alternative procedural mechanisms for that purpose may be addressed by the parties in their briefing on the merits if the Court grants the petitions for a writ of certiorari.

CONCLUSION

This Court's decision in *Aguilar* v. *Felton*, 473 U.S. 402 (1985), should be reconsidered and, we submit, overruled. If the Court agrees that this is an appropriate case in which to do so, the petitions for a writ of certiorari should be granted.

Respectfully submitted.

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